STATE OF MICHIGAN

IN THE 3rd CIRCUIT COURT FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff, v RICKY RIMMER, Defendant	§ § § § § § §	Case No. 75-007704-01-FC HON. CHRISTOPHER M. BLOUNT

Kym Worthy (P38875) Attorney for Plaintiff Wayne County Prosecutor's Office 1441 St. Antoine St. Detroit, MI 48226 (313) 224-2501	§ § § § § §	Darnell T. Barton, Esq. (P83363) Attorney for Defendant Barton Law, PLLC 220 W. Congress St. Detroit, MI 48226 (313) 288-8010

DEFENDANT'S RESPONSE TO PLAINTIFF'S ANSWER TO MOTION FOR NEW TRIAL/MOTION FOR RELIEF FROM JUDGMENT

TABLE OF CONTENTS

STATEMENT OF PROCEDURE

Mr. Rimmer initially filed in pro per; however, he has now procured a legal defense team. Specifically, Mr. Rimmer was correct in stating that MCL 770.1 entitles him to file a motion for new trial. Plaintiff purposely diminishes this Courts power by improperly supposing that MCL 770.2 does not provide for relief after the 60-day period, which is not true.[1] 'Good cause" has been demonstrated by the improper actions of the officers in charge, one of which was indicted for improper police behavior after the defendant was found guilty based off similar faulty, coerced information, as well as recantations of viable witnesses.

INTRODUCTION

Defendant Ricky Rimmer has been incarcerated for 47 years based upon the testimony of two police officers who manufactured the evidence that caused his conviction (officers who were not present when the crime occurred), and one eyewitness who identified Mr. Rimmer at trial, whose identification was manipulated by the officers. The only other evidence submitted at Mr. Rimmer's trial came from Larry Smith and Darryl McDonel, each of whom has recanted their testimony. Co-defendant Timothy Jordan invoked his Fifth Amendment right to remain silent and did not testify. The prosecutor improperly called Detroit Police Department Sergeant (Sgt.) James

[1] *MCL 770.2(4).*

Harris as a witness, who read Timothy Jordan's statement which incriminated Mr. Rimmer.

When eyewitness Harry Wilke testified, he testified that two officers came to his home with photographs of suspects. Mr. Wilke was unable to identify anyone.

The officer in charge of the case, Sgt. Leo Haidys, testified that "everything" in regard to the case, including interviewing witnesses, taking statements, requesting warrants, and collection of evidence, had to go through him as he was the officer in charge (OIC).

What is most important is that Smith recanted, and the appellate courts found that the trial court erred when it allowed Smith's preliminary examination testimony to be read at trial. However, the court found that the testimony of Wilke and McDonel was enough to uphold the conviction and ruled that the confrontation violation regarding the jury hearing Smith's pre-exam testimony was harmless error. McDonel has since recanted his testimony; thus, the improper reading of Smith's preliminary testimony carried much more weighed than just a harmless error.

On October 9, 1975, Sgt. James Harris took Larry Smith, who was already in the jail on other charges, out of the Wayne County Jail to DPD headquarters. Coincidentally, McDonel was also brought to the police station at the same time and was forced to make contact with Larry Smith and Sgt. Harris. Once there, Smith and Sgt. Harris told McDonel that his help was needed to arrest Jordan and Mr. Rimmer. McDonel agreed because Sgt. Harris and Smith told him that Mr. Rimmer and Jordan had killed his best friend Gregory Smith (Frog), who was Larry Smith's little brother. In other words, this same corrupt officer concocted a clandestine meeting using the dead brother of Larry Smith to sway he and McDonel's testimony in opposition of Mr. Rimmer's defense, which would corroborate the other tainted testimony that would later be recanted.

As part of McDonel and Jordan's coerced cooperation, McDonel was placed in a separate police car from Jordan. Both were taken to DPD and taken to the fifth floor by Sgt. Harris. Both

were placed in a room where Smith was waiting. Sgt. Harris then told the three of them (McDonel, Smith, and Jordan) to get their stories together because his goal was to focus on Mr. Rimmer. In other words, Sgt. Harris' improper actions enticed and encouraged all three individuals to incriminate Mr. Rimmer. Thus, the three concocted statements implicating Mr. Rimmer in the crime would later be recanted.

Although Sgt. Haidys, as stated above, testified *inter alia* that he was the OIC and that "anything" that was done in the case had to go through him for approval, he could not inform the court of who the two unnamed officers were that took physical photographs of Mr. Rimmer, in violation of Mr. Rimmer's Constitutionally protected right, and exposed them to the eyewitness Harry Wilke's home to review prior to trial. Unfortunately, the information regarding the photographs was never disclosed to the defense and was not revealed until the eyewitness took the stand at trial.

Even more troubling, on Feb. 5, 1976, Sgt. Haidys appeared in court at 9:00 a.m. (before the proceedings started) with a report that he had written, detailing a telephone call that he had received from Larry Smith at 8:45 a.m. The report stated:

> "Above time and place, Sgt. Leo Haidys received a phone call from a witness in the above court case, a Larry Smith. Mr. Smith told Sgt. Haidys stated that He had a problem and that he could not take the stand, and that Sgt. Haidys knew he had a problem. He further stated that what he had told me and what he testified to at the examination was true but he could not take the stand.
>
> Sgt. Haidys stated that he would relay this information to Mr. Kenny the prosecutor and see if he could arrange a meeting with the judge in regards to his problem.
>
> Sgt. Haidys further stated that per orders of Judge Heading he was ordered to appear in court this morning to take the stand in regards to this trial."

Leo Haidys Sgt. Badge 5-49, Homi Sqd 7. 2-5-76 8:45 A.

Thus, Sgt. Haidys testified on the stand that Larry Smith told him that he could

not testify because he did not want to be labeled "a rat." This Court and the earlier courts would have no idea if Sgt. Haidys effectively forced Smith *not* to appear knowing his faulty, and later recanted, preliminary examination testimony would be read into the record.

Coincidentally, Smith did in fact come to court and testify, which begs several questions. For example, if Smith had allegedly made that statement that Sgt. Haidys claimed, why did Smith appear in court? Further, why did Smith appear in Court and not call the same contact, Sgt. Haidys, that he allegedly called to say he was *not* going to come to court, to say he *would* appear and testify?

Most egregiously, Smith appeared, testified, and *denied* that he told Sgt. Haidys that he did not want to testify. In other words, the prosecution's witness testified that the OIC on the case, Sgt. Haidys, lied in open court. Smith further testified that he told Sgt. Haidys that he merely did not have transportation to get to court (TT 318-22). After Sgt. Haidys and Smith testified, the court *ordered* Sgt. Haidys *not* to talk to Smith again. When Sgt. Haidys tried to explain to the court that he did nothing wrong, the court informed Sgt. Haidys that he and Sgt. Harris were under court order not to talk to Mr. Smith again (TT 365-66).

Smith went on to testify at trial that he lied back at the preliminary examination when he testified that Mr. Rimmer was involved in the crime. *After* Smith testified, and without counsel to advise him of his Fifth Amendment invocation, the court *then* asked him if he wanted a lawyer to explain to him his rights. Despite Smith being available, the court still supported the prosecution by allowing the jury to hear Smith's preliminary examination testimony instead.

In the case at bar, Plaintiff has incorrectly cited or relied upon outdated provisions of the court rules and attempted to mislead the Court. Plaintiff's response states:

> "Notably, this is not the first time a defendant has tried to use MCL 770.1 and MCL 770.2 to skirt the requirement to comply with the standards of a motion for relief from judgment. In the unpublished case of *People v. Swain*, the Court of Appeals held a defendant cannot file a motion for a new trial under MCL 770.1 and MCL 770.2 after his time to file that motion had expired, according to the court rules."
>
> Footnote [26] states:
>
> "Appendix I. *People v. Swain,* unpublished opinion of the Court of Appeals, issued February 5 (Docket No. 314564), 2015 WL521623. P.6*6, reversed on different grounds by appeal *People v. Swain,* 499 Mich 920 (2016)."

Plaintiff's response at 8.

Plaintiff either failed to research the concurring opinion, or refused to include that important aspect as it would contradict Plaintiff's assertions. Specifically, the concurring opinion on the February 5, 2015, *Swain* ruling by Judge Cynthia Diane Stephens states:

> STEPHENS, J. (concurring) I concur in the majority's result and analysis as to the issues of newly discovered evidence and a Brady violation. I concur in the result only as to the actual innocence claim because while I agree there is no authority for an independent actual innocence standard in Michigan, I believe the proofs in this case are such that under a Swain, 288 Mich App at 638, standard, this case is one in which it is more likely than not that no reasonable juror would have found the defendant guilty. This case is already one with recantations and inconsistencies which, with the testimony of Book, would be one where a guilty *(sic)* verdict would more likely than not be rendered by a reasonable jury. /s/ Cynthia Diane Stephens

People v. Swain, No. 314564, 2015 Mich. App. LEXIS 200, at *25 (Ct. App. Feb. 5, 2015).

The failure to add Judge Stephens' concurring opinion is extremely important to this Court's review of Mr. Rimmer's motion, and why he has asked this Honorable Court to review his motion under MCL 770.1 and MCL 770.2. In her concurring opinion, Judge Stephens states that she was concurring in the result only as to the actual innocence claim because she agrees there is no independent actual innocence standard in Michigan.

Based on Judge Stephens' concurring opinion, the Michigan Supreme Court granted leave

to appeal on the issue of actual innocence:

> (3) by what standard(s) Michigan courts consider a defendant's assertion that the evidence demonstrates a significant possibility of actual innocence in the context of a motion brought pursuant to MCR 6.502(G), and whether the defendant in this case qualifies under that standard;
>
> (4) whether the Michigan Court Rules, MCR 6.500 *et seq.* or another provision provide a basis for relief where a defendant demonstrates a significant possibility of actual innocence;
>
> (5) whether, if MCR 6.502(G) does bar relief, there is an independent basis on which a defendant who demonstrates a significant possibility of actual innocence may nonetheless seek relief under the United States or Michigan Constitutions, and
>
> (6) whether the defendant is entitled to a new trial pursuant to MCL 770.1.

People v Swain, 499 Mich 920 (2016).

Clearly, the concurring opinion of Judge Stephens caused a dramatic change in MCR 6.502(G)(2), and it also apparent that MCR 6.508(G)(2) was precluding Judge Stephens from granting Swain relief. Thus, the Court asked the bench and bar to file *amicus curae* briefs regarding (6) whether the defense is entitled to a new trial pursuant to MCL 770.1. *See People v Swain,* 499 Mich 920 (2016).

Lastly, Judge Stephens' concurring opinion eloquently stated:

> The trial court also granted defendant's request for relief under MCL 770.1, which allows a trial court to grant a new trial "for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done, and on the terms or conditions as the court directs."

People v. Swain, No. 314564, 2015 Mich. App. LEXIS 200, at *15 (Ct. App. Feb. 5, 2015).

Mr. Rimmer will now address each of the plaintiff's positions.

ARGUMENT

I. MR. RIMMER'S MOTION ASKED THE COURT TO REVIEW HIS CLAIMS UNDER MCL 770.1 INSTEAD OF MCR 6.500 SINCE IT IS THE PROPER LEGAL COURSE AND A DECISION FROM THE COURT REGARDING THIS ISSUE WOULD AID THE STATE SINCE IT INVOLVES A JURISPRUDENTIALLY SIGNIFICANT ISSUE.

On September 30, 2015, the Michigan Supreme Court granted the application for leave to appeal in *People v Swain,* SC 150994 Mich (2015). The Court also invited the Prosecution Association of Michigan and the Criminal Defense Attorneys of Michigan to file briefs *amicus curiae* and allowed other interested parties to move the Court for permission to file briefs *amicus curiae.*

Based on the permission by the Court to file briefs *amicus curiae*, former United States Attorney for the Western District of Michigan John Smietanks, and former United States Attorney for the Eastern District of Michigan Saul Green, and prosecutors Thomas Cranmer, James Samuels, Thomas Rombach, Gerald Gleeson II, Fred Mester, Anthony Badovinas, and Brandon Hultink, hired a law firm from Chicago, Illinois, to represent Michigan prisoners on the issue of MCL 770.1 and MCL 770.2. The aforementioned brief was filed and accepted by the Court. (See order allowing filing of *amicus curiae* brief, attached.) (See also *amicus curiae* brief attached.)

Moreover, since the Supreme Court granted leave on the issue of MCL 770.1 (whether a defendant can file a motion for a new trial under MCL 770.1 instead of MCR 6.500), the Court has shown a strong interest regarding this issue and the only way for the Michigan Supreme Court to address this issue is for a defendant to first establish it in the trial court. Furthermore, Plaintiff in their response stated that Swain tried to "skirt" the requirements of MCR 6.500, and that the Court of Appeals firmly rejected Swain's position. *Plaintiff's response at 8.* Simultaneously,

Plaintiff states that the unpublished Court of Appeals February 5, 2015, was reversed on different grounds, citing to *People v Swain*, 499 Mich 920 (2016). That is simply not true.

> "On order of the Court, leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we REVERSE the February 5, 2015 judgment of the Court of Appeals and we REMAND this case to the Calhoun Circuit Court for proceedings consistent with its judgment ordering a new trial.
>
> * * *
>
> In light of this disposition, we decline to address the other issues presented in our order, granting leave to appeal." *Swain*. 499 Mich 920 (2016).

Clearly, the Court did <u>not</u> address and reject the claim regarding MCL 770.1, because the case was decided on the first claim.

Furthermore, looking at the holding in *Swain* closely, it can be said that the Court did in fact rule that a defendant can be granted relief under MCL 770.1, when the Court remanded the case back to the Calhoun Circuit Court for proceedings <u>consistent</u> with its judgment ordering a new trial. The trial court found that Swain was innocent, that the state had suppressed evidence, and that justice had not been done pursuant to MCL 770.1. Thus, MCL 770.1 is alive and well regarding motions for a new trial.

II. PLAINTIFF'S POSITION REGARDING MCR 6.502(G)(2); AND NEWLY DISCOVERED EVIDENCE UNDER PEOPLE V CRESS, 468 MICH 678 (2003) IS UNATTAINABLE, DUE TO PLAINTIFF'S MISREPRESENTATION OF THE APPLICABLE LAW.

The Supreme Court of Michigan has already recognized that the filing stage requirement under MCR 6.502(G)(2) does not require intensive merits analysis or automatic entitlement to relief. In *People v. Swain*, the Court found that it was reversible error to apply the standard for obtaining a new trial based on newly discovered evidence, to the new evidence exception under MCR 6.502(G)(2). *People v. Swain*, 499 Mich 920, 920; 878 NW2d 476, 476 (2016) (discussing

People v Cress, 468 Mich 678; 664 NW2d 174 (2003), which established the standard for obtaining a new trial based on newly discovered evidence). In the case below, the Court of Appeals had concluded that *Swain*'s petition did not meet the MCR 6.502(G)(2) new evidence exception since she "ha[d] not shown entitlement to relief on the basis of newly discovered evidence." *People v. Swain*, unpublished per curiam opinion of the Court of Appeals, issued Feb 5, 2015 (Docket No. 314564), 2015 WL 521623, p 2 (emphasis added). The *Swain* Court held that the Court of Appeals had erroneously applied a merits standard to a procedural question, that is, by requiring the defendant to demonstrate entitlement to relief at the filing stage. *Swain*, 499 Mich at 920. "*Cress* does not apply to the procedural threshold of MCR 6.502(G)(2), as the plain text of the court rule does not require that a defendant satisfy all elements of the test." Id. (emphasis added); see also People v Swain, 288 Mich App 609, 631; 794 NW2d 92, 104 (2010) ("The court rules are silent on the procedure to be used by a trial court for determining whether a successive motion for relief from judgment falls within either of the two exceptions of MCR 6.502(G)(2).") Since *Swain*, the Court has reaffirmed that a court commits reversible error if it applies *Cress* "to an analysis of whether the defendant's motion was improperly successive under MCR 6.502(G)." *People v Watkins*, 0 Mich 851, 851; 883 NW2d 758, 758 (2016). In the new evidence context, the Court has clarified since *Swain* that the bar to satisfy the procedural threshold of MCR 6.502(G)(2) is low.

A successive motion satisfies MCR 6.502(G)(2) where it is based on several statements that were not previously presented to the trial court. *People v Robinson*, 503 Mich 883, 883; 919 NW2d 59, 59 (2018***). Even a successive motion that relies on a single piece of new evidence, such as an affidavit that was not previously presented to the trial court, satisfies the new evidence exception***. *People v McClinton*, 501 Mich 944, 944; 904 NW2d 619, 619 (2017) (emphasis added). Before *Swain*, the lower courts had conflated the new evidence exception under MCR 6.502(G)(2)

and the merits standard under *Cress* in other cases. See Note, Disentangling Michigan Court Rule 6.502(G)(2): The "New Evidence" Exception to the Ban on Successive Motions for Relief from Judgment Does Not Contain a Discoverability Requirement, 113 Mich L Rev 1427 (2015) (discussing e.g., People v Vinson, unpublished per curiam opinion of the Court of Appeals, issued July 26, 2012 (Docket No. 303593) 2012 WL 3046236, p 7, and concluding that "if the court of appeals had not conflated section 6.502(G)(2)'s new evidence exception with *Cress*, Vinson would likely have prevailed.").

Finally, the recent amendments to MCR 6.502 demonstrate a willingness to not shut the courthouse doors on colorable claims for procedural reasons, and to allow them to be reviewed on the merits. The 2018 amendment to MCR 6.502, inserting a discretionary waiver of the ban on successive motions for those who are "actually innocent," reflects a turn towards greater generosity in allowing the substance of claims to be reviewed instead of relying on procedural hurdles. Amendments of Rule 6.502 of the Michigan Court Rules and Rule 3.8 of the Michigan Rules of Professional Conduct, ADM File No. 2013-05; ADM File No. 2014-46 (Sep 20, 2018). Likewise, the addition of 6.502(G)(3), providing a non-exhaustive list of what type of evidence is "new evidence" for purposes of 6.502(G)(2) allows more defendants to have their new evidence claims considered on the merits. *Michigan Innocence Clinic, Re: Comments on Proposed Revisions to MCR 6.502(G) and MRPC 3.8 (Aug. 27, 2018)*. Heightening the procedural bar for the change in law exception alone, after loosening the bar for the new evidence exception, would be inconsistent and confusing. See e.g., Omne Financial, 460 Mich at 312.

III. THE AFFIDAVITS OF MCDONEL AND JORDAN CONSTITUTE NEWLY DISCOVERED BRADY EVIDENCE UNDER MCR 6,502(G). HERE, PLAINTIFF CONFUSES CRESS CLAIM (NON-CONSTITUTIONAL) WITH BRADY (CONSTITUTIONAL) CLAIM.

In 2014, in *People v Chenault*, 495 Mich 142 (2014) the Michigan Supreme Court absolved defendant of the diligence requirement by removing the diligence prong, therefore, removal of the diligence prong in Chenault clears the way for Mr. Rimmer's Brady constitutional claim to proceed under MCR 6.502(G).

Mr. Rimmer did not learn of this new *Brady* evidence until the McDonel and Jordan affidavits. Plaintiff misunderstood the drive of Mr. Rimmer's *Brady* claim. Mr. Rimmer's newly discovered evidence claims rests on a constitutional position, where *Cress* rests on a non-constitutional position. Under *Cress*, the state's use of the diligence prong would come into play because *Cress* contains a diligence factor—one which *Brady* and *Chenault* do not contain. For Mr. Rimmer, however, 6.502(G) allows his constitutional Brady claim to proceed.

Mr. Rimmer's *Brady* claim cannot by directed by *Cress*, simply because *Cress*' newly discovered evidence has two provisions that *Brady* does not require:

1. Discovery
2. Diligence.

Brady is superior to *Cress*. *Brady* is synonymous with newly discovered evidence which does not require diligence or a discoverability component; thus, *Cress* shuts off Mr. Rimmer's constitutional *Brady* claim since it forces him to show that the evidence was newly discovered, (i.e., he could not have known about it before, or during trial, and that he used diligence to bring the claim to the forefront). A true *Brady* claim is:

1. The evidence was favorable to the accused;
2. That it was suppressed;
3. That it was material.

Under *Cress'* newly discovered evidence a defendant must show,

1. The evidence itself, not merely its materiality, was newly discovered.
2. The newly discovered evidence was not cumulative.
3. The party could not, using reasonable diligence, have discovered and produced the evidence at trial; and
4. The new evidence makes an acquittal probable at trial.

Brady is rooted in the Constitution under the Due Process Clause of the Fourth Amendment. *Cress* is not. MCR 6.502(G) allows for new law, newly discovered *Brady* evidence and newly discovered *Cress* evidence.

Mr. Rimmer fully understands that he has no standing to challenge any rights of Jordan and McDonel that may have been violated by the state. Plaintiff attempts to make much of the term "agent." It appears that is the correct term for Smith and McDonel, however, that is not Mr. Rimmer's argument. Mr. Rimmer's position is that when they arrived on the fifth floor and were placed in the room together, the conversations, the intent of those conversations, was to manufacture evidence against Mr. Rimmer, which is newly discovered *Brady* impeachment evidence. Mr. Jordan did not testify at trial. Rather, he sat next to Mr. Rimmer as a co-defendant, and he invoked his Fifth Amendment right not to testify. Sgt. Harris took the stand and read to the jury the statement that he had written, and Jordan had signed, to which Mr. Rimmer looked at Jordan and said, "why don't you tell them that not true?" Whereas Jordan replies: "I can't incriminate myself." The same thing with McDonel, he testified that "I didn't tell Sgt. Harris that

I saw Rimmer chase and shoot the victim." Again, Sgt. Harris takes the stand and reads the statement that he had written and McDonel signed. In addition, Sgt. Haidys, the OIC, did not inform the defense of the two officers who took photographs of Mr. Rimmer specifically to the home of Harry Wilke. Further, Harry Wilke was the only eyewitness to the events (as plaintiff states in their response), however he failed to identify anyone. The same eyewitness later viewed a live line-up and stated, "No. 4 looks like him." The defense did not learn of the "photographic line-up" that took place at the eyewitness's home until trial, where the eyewitness testified that two officers came to his home with photographs, but he could not identify anyone.

Sgt. Haidys testified that he did not know who the officers were, however, that he was the OIC and that everything had to be approved by him. However, this photo line-up was not included in the discovery material. The eyewitness's tentative identification of No. 4 at the live in-custody line-up, and at trial, came from the photographic line-up at his home, and the re-occurring viewing of Mr. Rimmer. Sgt. Haidys also testified (outside the presence of the jury) that Larry Smith had called him on the day of trial and told him that he could not testify since he did not want to be labeled as a "rat." However, Smith did appear at the trial, and he also testified outside the presence of the jury, denying that he had told Sgt. Haidys that he did not want to testify. Instead, Smith testified that he only needed transportation to get to court. Based upon Sgt. Haidys' statement, the court did not allow Smith to testify before the jury; yet the court allowed his preliminary examination testimony to be read to the jury.

It is Mr. Rimmer's position that the conversations and the contents of the conversations that Sgt. Haidys and Sgt. Harris had with these witnesses constitutes newly discovered *Brady*/*Giglio* impeachment evidence. These witnesses denied that they had made these statements to the officers, however, the officers claimed that the statements were true. Both officers had committed

misconduct in the past and were suspended by the police department for lying during their misconduct hearings. Both were found not guilty by juries (Sgt. Harris, for attempted murder of a law enforcement officer, Sgt. Haidys for assault and attempted murder). Mr. Rimmer could have impeached both officers by pointing out that they were not credible due to their past misconduct.

Furthermore, regarding the recantation, it is extremely "convenient" that Smith and McDonel were considered reliable when they favored the government's assertions, however, they are now automatically unreliable when they oppose the government in favor of Mr. Rimmer. Mr. Timothy Jordan did not testify at trial, therefore his affidavit also constitutes newly discovered Brady evidence, for the purpose of 6.502(G).

Clearly apparent is that the Plaintiff has done exactly what the Swain court disavowed by conflating 6.502(G) with Cress. *Swain*, 499 Mich 920 (2016).

It is evident that plaintiff has simply seen fit to mislead the court, instead of researching updated law in this area. Mr. Rimmer chooses not to address plaintiff's 6.508(D)(3) position since he cannot force a witness to come forward as they will come when they decide to do so.

Plaintiff states at p.9 of their response that "The People have been unable to obtain defendant's file. Accordingly, they say, it is unknown whether the information in these affidavits qualifies as newly discovered evidence." Most troubling for this Court is it that the plaintiff so viciously attacks Mr. Rimmer's pleadings, and in the same breath says that the government has not read his Mr. Rimmer's file.

Here, the affidavits of McDonel and Jordan presented must be considered in light of recent Michigan Supreme Court rulings, *People v. Hammock*, 946 N.W.2d 546 (Mich. 2020) and *People v Johnson*, 502 Mich 541 (2018). Plaintiff scoffs, "Neither of these affidavits—wherein defendant's coconspirators are now working together to try to get him out of prison—are remotely

trustworthy. Recantation testimony, even when the circumstances do not make it clearly incredible, has long been viewed as inherently untrustworthy." *Plaintiff's Response at 11*.

In *People v. Hammock*, 946 N.W.2d 546 (Mich. 2020), the Michigan Supreme Court laid to rest "conspiracy theories" that affidavits written by witnesses including other prisoners and co-defendants, are "inherently untrustworthy." In direct contradiction to the Plaintiff's assertions, it found:

> CAVANAGH, J. (concurring). I concur in the order remanding this case to the trial court for an evidentiary hearing because defendant's offer of proof identifies evidence that, if believed, would raise serious concerns about his conviction. Further, not only is the offer of proof not incredible on its face, but it offers the possibility of development at an evidentiary hearing such that defendant may be able to establish he is entitled to a new trial under *People v Johnson*, 502 Mich 541 (2018).
>
> * * *
>
> "Justice MARKMAN expresses disbelief that Carter was selling marijuana at 2 a.m. when he was 13 years old, that Carter and defendant happened to be incarcerated together eight years later, and that Carter happened upon the Court of Appeals opinion affirming defendant's conviction. In Justice MARKMAN'S view, this version of events "lacks an air of credibility . . . ." And yet, it is true that people in prison run into past acquaintances, that some people serving long prison sentences spend long hours in the law library falling down legal rabbit holes, and that some of those people were selling marijuana at 2 a.m. when they were 13 years old. These experiences are unlike my own, and though I cannot speak for him, they may also be unlike Justice MARKMAN's. But maybe for exactly that reason the judicial function in this matter is not to pass on the credibility of Carter's story, but only to ask "whether a reasonable juror could find the testimony credible on retrial," Johnson, 502 Mich at 567 (emphasis altered). Justice MARKMAN weighs these and other considerations and is left with "serious questions regarding Carter's affidavit . . . ." Whether or not there are serious questions about Carter's affidavit, Carter's corroborated account raises serious questions about Pippen's account, which sent defendant to prison. And an evidentiary hearing presents the opportunity to answer both sets of questions.

Hammock at p.7.

The court's holding in Hammock speaks volumes in rejection of plaintiff's view of evidence submitted in post-conviction pleadings.

RELIEF REQUESTED

WHEREFORE, for the reasons stated in Mr. Rimmer's Motion and Memorandum of Law, he requests that this Honorable Court conduct an evidentiary hearing and order a new trial.

Respectfully submitted,

BARTON LAW, PLLC

By: _____

Darnell Thomas Barton (P83363)
Attorney for Plaintiff
220 W. Congress St.
Detroit, MI 48226
(313) 288-8010

Dated: August 1, 2023

STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

vs.

Supreme Court No. 150994
Court of Appeals No. 314564
Lower Court No. 2001-004547-FC

Lorinda Irene Swain,
Defendant-Appellant.

AMICUS CURIAE BRIEF

OF CURRENT AND FORMER MICHIGAN PROSECUTORS JOHN SMIETANKA, THOMAS CRANMER, JAMES SAMUELS, THOMAS ROMBACH, GERALD GLEESON II, SAUL GREEN, FRED MESTER, ANTHONY BADOVINAC, AND BRANDON HULTINK

JENNER & BLOCK LLP
Sara Tonnies Horton (admitted *pro hac vice*)
Chad J. Ray (admitted *pro hac vice*)
Paul D. Margolis (admitted *pro hac vice*)
ATTORNEYS FOR AMICUS CURIAE
CURRENT AND FORMER MICHIGAN PROSECUTORS
353 N. Clark Street
Chicago, Illinois 60654

PRICE HENEVELD LLP
Gregory A. Lewis (P75796)
OF COUNSEL
695 Kenmoor Ave SE
PO Box 2567
Grand Rapids, Michigan 49501-2567

Dated: January 15, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

If it is not contrary to the law for an actually innocent person to be locked up for a crime she never committed, what value is the law? The word-play of lawyers is mere pettifogging when aimed at keeping innocent people in prison. It is important to maintain perspective in deciding legal issues that strike to the core of justice. As Michigan knows well, even governors may become prisoners, and prisoners governors, and any of the citizens in whose name a sentence is carried out today may be wrongfully accused of a crime tomorrow. J. Rawls, A THEORY OF JUSTICE, 136-42 (1971) (A just society is created by parties behind "the veil of ignorance" so that principles are generated independent of personal station). Nobody truly believes that punishing an innocent person for a crime is justified by finality or to avoid reopening the wounds of victims or their families, because nobody would accept such an excuse if they found themself wrongfully convicted and seeking justice.

Former Michigan prosecutors understand the need to balance the power entrusted to them by the people of the State of Michigan with the pursuit of justice, and an unwavering ethical commitment to the overall public good. This brief presents their combined conscience.

On September 30, 2015, the Michigan Supreme Court granted leave to appeal *People of the State of Michigan v. Lorinda Irene Swain*, Supreme Court Case No. 150994, Court of Appeals Case No. 314564, Calhoun County Court Case No. 2001-004547-FC, and requested briefing on the interpretation of the law, including certain Michigan statutes. This brief discusses Michigan laws and court rules providing access to a new trial or the collateral review of a conviction for defendants who allege that they have been wrongfully convicted, but who have exhausted their rights to appeal. Michigan Court Rules ("MCR") subsection 6.500, et seq., and Michigan Compiled Laws ("MCL") section 770.1, are the procedural and substantive mechanisms used to move to set aside verdicts.

This brief analyzes MCL 770.1 and its interplay with MCR 6.500, *et seq*., and we argue that MCL 770.1 provides a separate, and independent, mechanism for relief aside from MCR 6.500, *et seq*. This brief also analyzes whether "newly discovered evidence" must simply be evidence not discovered before a first motion under MCR 6.502, or whether the rule requires that "newly discovered evidence" also be evidence that could not have been previously discovered through the exercise of diligence. We argue that the statutes and court rules should be construed as written. This means that under 6.502(G)(2) evidence must merely be newly discovered, not that a litigant would be required to also prove diligence in seeking the evidence.

Our interpretations of the statutes and court rules are further supported by (1) notions of federalism, which favor power being exercised at the most local level possible, (2) the ethical mandate of prosecutors and the courts in administering justice, and (3) cost.

II. STATUTES AT ISSUE IN *PEOPLE V. SWAIN*

Defendants alleging wrongful conviction in the State of Michigan, but who failed to secure release on appeal, must resort to MCL 770.1 and MCR 6.500, *et seq*.

MCL 770.1 allows, as a matter of criminal procedure, the trial court to grant a new trial to a defendant:

> The judge of a court in which the trial of an offense is held may grant a new trial to the defendant, for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done, and on the terms or conditions as the court directs.

MCL 770.1 reflects a legislative policy determination by the State of Michigan because it allows the trial court to grant relief "when it appears to the court that justice has not been done." This language establishes that the legislature intended MCL 770.1 to empower trial courts to prevent miscarriages of justice. The subsequent rules in the statute provide additional substantive rights,

such as the right to testing of biological material where the identity of the perpetrator was an issue at trial, and the right to appeal adverse decisions by the trial court. MCL 770.3, 770.16.

Separate from the substantive grounds of relief found in Michigan's statutes, the Michigan Supreme Court has promulgated rules for practice and procedure under the rulemaking power granted by the Michigan Constitution. *See* Michigan Court Rules of 1985; Const 1963, art 6, § 5. Michigan Court Rules are "intended to promote a just determination of every criminal proceeding. . . " and "to be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay." MCR 6.002. Subsection 6.500 authorizes review of a judgment of conviction and sentence that is no longer subject to appellate review. MCR 6.501. More specifically, MCR 6.502 allows for a motion to the trial court to set aside or modify a judgment. Relevant here, successive motions for relief under MCR 6.502 are to be denied pursuant to MCR 6.502(G)(1), except as provided by MCR 6.502(G)(2), which states in relevant part that a "defendant may file a second or subsequent motion based on . . . a claim of new evidence that was not discovered before the first such motion."

Once a motion passes the procedural hurdle of MCR 6.502(G), the substantive standard for entitlement to relief under 6.508(D) must also be met. MCR 6.508(D)(3) only allows relief to be granted for motions alleging grounds for relief "which could have been raised . . . in a prior motion under this subchapter" if the defendant demonstrates:

> (a) good cause for failure to raise such grounds on appeal or in the prior motion, and
>
> (b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,
>
> > (i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;
> >
> > (ii) in a conviction entered on a plea of guilty, guilty but mentally ill, or nolo contendere, the defect in the proceedings was such that it renders the plea an

> involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand;
>
> (iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;
>
> (iv) in the case of a challenge to the sentence, the sentence is invalid.
>
> The court may waive the "good cause" requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime.

MCR 6.508(D)(3)'s waiver of the "good cause" requirement under MCR 6.508(D)(3)(a) reduces the substantive barrier to relief. However, waiver only applies for the exceptional cases where a trial court finds that "there is a significant possibility" that the defendant is innocent of the crime for which they were convicted and sentenced.

This brief focuses on the interpretation of MCL 770.1 and MCR 6.500, *et seq*.[1] However, the analysis applies equally to the interpretation of any right to relief related to criminal matters within the State of Michigan, whether based on case law such as *Herrera v Collins*, 506 US 390 (1993), the United States' Constitution, Michigan's Constitution, or the criminal statutes within the State of Michigan.

III. ARGUMENT

In its decision in *People of the State of Michigan v. Lorinda Irene Swain*, the Michigan Court of Appeals narrowed the relief possible under MCL 770.1 and MCR 6.500, *et seq*., as discussed in Section III.a-b below. The narrowing of these substantive and procedural mechanisms for relief from judgment implicates important policies underlying the Michigan Court Rules and Michigan law in general, including (1) the relationship between the State of Michigan and the federal government, (2) the ethical obligations of prosecutors and the courts in

[1] This brief focuses solely on the interpretation of Michigan law, and does not review or analyze the underlying factual findings by Judge Sindt or the determination that Ms. Swain was entitled to a new trial.

interpreting and applying the law, as well as (3) considerations of costs borne by the State of Michigan and its citizens. These policies are discussed below in Sections III.c-e.

A. Relevant Case History and the Competing Interpretations of MCL 770.1 and MCR 6.500, et seq.

The trial court applied MCL 770.1 and MCR 6.502 as written and granted Lorinda Swain's motion for a new trial. Judge Conrad Sindt, the trial court judge who presided over every day of trial and every witness presented in the case, found that the evidence presented in Ms. Swain's motion was "new evidence that was not discovered before the first such motion." Trial Court Opinion at 2-6. On this basis, Judge Sindt reviewed the newly discovered evidence, rejected some grounds, and granted those grounds that he found met the standard for relief from judgment. *Id*. at 2-11. Judge Sindt then granted relief under MCL 770.1, finding that "justice has not been done" in the case, as well as under *Herrera v. Collins* based on a finding of actual innocence. *Id*. at 11-12.

On appeal by the prosecution, the Michigan Court of Appeals found that Judge Sindt abused his discretion in granting Ms. Swain relief because her motion was barred as a matter of law under MCR 6.502(G), and, even if it was not, that Judge Sindt abused his discretion in granting relief based on MCL 770.1, a *Brady* violation, and Ms. Swain's freestanding innocence claim. Court of Appeals Opinion at 2, 5, 6, 7, 9-10.

B. The Court of Appeals Misinterpreted MCL 770.1 and MCR 6.500, et seq.

The Court of Appeals denied relief under MCL 770.1 on a finding that the relief sought was time barred pursuant to MCL 770.2(1). *Id*. at 7. However, the Court of Appeals did not consider MCL 770.2(4). MCL 770.2(4) states that a court of record may always "grant a motion for a new trial for good cause shown." MCL 770.2(4) applies here because the trial court found

"good cause" and supported its finding at length in its written opinion. Trial Court Opinion at 2-8, 11.

Unfortunately, the Court of Appeals did not consider whether the facts found by Judge Sindt constituted "good cause." Instead it denied relief under MCL 770.1 by finding that only MCR 6.502 may apply. Court of Appeals Opinion at 7. In support of its reversal of the trial court, the Court of Appeals cited *People v Kincade* and *People ex rel Coon v Plymouth Plank Rd Co*. Both are in inapposite because neither case considered or decided the scope of MCL 770.1 or 770.2. *People v Kincade* relates to a defendant's right to appeal decisions made by a trial court hearing a case on a limited remand from an appeals court. 206 Mich App 477, 481-82; 522 NW2d 880 (1994). And, *People ex rel Coon v Plymouth Plank Rd Co* relates to a motion to set aside the verdict in a civil dispute where the parties continued to trial despite a party's attorney withdrawing from the matter for health reasons. 32 Mich 248, 249-50 (1875).

Contrary to the Court of Appeal's decision, MCL 770.1 stands as a substantive ground for relief independent of any provided by the Michigan Court Rules. The State of Michigan passed MCL 770.1 into law to correct wrongful convictions within the State of Michigan, by providing for substantive relief from judgment from trial courts "when it appears to the court that justice has not been done." MCL 770.1. Statutes passed into law in the State of Michigan may not be overridden by court rules. *McDougall v. Schanz*, 461 Mich. 15, 27, 579 NW2d 148 (Mich. 1999) ("it cannot be gainsaid that this Court is not authorized to enact court rules that establish, abrogate, or modify the substantive law. Rather, as is evident from the plain language of art 6, § 5, this Court's constitutional rule-making authority extends only to matters of practice and procedure.") (citing *Shannon v Ottawa Circuit Judge*, 245 Mich. 220, 222-223; 222 N.W. 168 (1928).) Therefore, by providing trial courts with a substantive ground for relief "when it appears

to the court that justice has not been done," MCL 770.1 stands as a substantive law independent of the Michigan Court Rules.

The Court of Appeals further denied relief under MCR 6.500, *et seq*., by incorporating the substantive requirements for relief under MCR 6.508(D) into the procedural requirements stated in MCR6.502(G), and finding that this Court's decision in *Cress* applied. Court of Appeals Opinion at 2-6. In *Cress*, the Court limited newly discovered evidence to the evidence "the party could not, using reasonable diligence, have discovered and produced . . . at trial." *See People v. Cress*, 468 Mich 678; 664 NW2d 174 (2003). However, the Court in *Cress* did not consider or decide the standard for review of successive motions for relief under 6.502(G). Rather, *Cress* considered the substantive requirement for claims for relief from judgment where newly discovered evidence arguably could have been discovered before trial under MCR 6.508(D), and not based on evidence only discovered after a motion under MCR 6.502 had already been filed, and presented for the first time in a successive motion for relief from judgment under MCR 6.502(G).

MCR 6.502(G) and 6.508(D) provide separate hurdles for defendants. MCR 6.502(G) procedurally limits successive motions for relief from judgment, while 6.508(D) substantively defines the showing a defendant must make for relief. By reading the substantive requirements of MCR 6.508(D) into the procedural bar of MCR 6.502(G), the Michigan Court of Appeals significantly narrows the prospects for relief from judgment for those wrongfully convicted in the State of Michigan.

This distinction matters. Judge Sindt found that there is a significant possibility that the defendant, Ms. Swain, is innocent of the crime. Trial Court Opinion at 7 ("That 'significant possibility' [of innocence] continues to exist in this case, even more so than the first time this

Court made that determination . . . . This Court has no doubt about it."). That finding removes the "good cause for failure to raise such grounds on appeal or in the prior motion" requirement under MCR 6.508(D). Thus, if the Trial Court's plain reading of the statute is correct, then Ms. Swain's motion was properly granted. However, if the Michigan Court of Appeal's interpretation of 6.502(G) is correct a defendant must also meet the *Cress* standard showing "good cause" for not presenting the evidence at trial, rather than just presenting evidence that "was not discovered before the first" motion under MCR 6.502. This requirement raises the procedural barrier for relief because MCR 6.502(G) does not contain a similar provision to MCR 6.508(D)(3)'s waiver clause which eliminates the "good cause" requirement in cases of innocence. Thus, by combining the standards of review for these provisions, the Court of Appeals renders MCR 6.508(D)(3)'s waiver clause superfluous in the statute by making the "good cause" requirement both a procedural and substantive bar to relief.

In considering the present case, the Michigan Supreme Court is being called upon to decide between the interpretations of (1) the trial court, which interpreted MCL 770.1 as written, or (2) the Court of Appeals, which significantly narrowed the statute, by limiting MCL 770.1 to the scope of relief possible under MCR 6.500, *et seq*. Similarly, the Michigan Supreme Court is called upon to decide between (1) the trial court's interpretation of the plain language of MCR 6.502, in granting relief based on evidence that "was not discovered before the first" motion under MCR 6.502, or (2) the Court of Appeals narrower interpretation of the statute. As outlined above, the Court of Appeals interpretation narrowed MCR 6.502(G) by reading-in the additional requirement that newly discovered evidence under the statute must be limited to evidence "the party could not, using reasonable diligence, have discovered and produced . . . at trial." The

Court of Appeals' narrowing of the statutes and court rules is improper as a matter of interpretation, because, in both cases, requirements outside the plain language are read-in.

C. Notions of Federalism Support Expansively Interpreting the Statutes to Maintain Power at the State Level

The Court of Appeals' narrow interpretation of the statute and court rules violates notions of federalism. The individual states are to be the chief arbiters of state criminal adjudications, and when such decisions are reviewed by federal courts, federalism issues may arise as to the propriety of such review. Sarah A. Mourer, *Gateway to Justice: Constitutional Claims to Actual Innocence*, 64 U. Miami L. Rev. 1279, 1282 (2010). There are two types of federalism at issue here: horizontal and vertical. Horizontal federalism considers the possibility of social progress in the states' capability to experiment with and compete in devising varying solutions to social problems. *See, e.g., New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try social and economic experiments without risk to the rest of the country.").

By enacting statutes and court rules providing for post-conviction relief where newly discovered evidence suggests wrongful conviction, *e.g.* MCL 770.1 and MCR 6.500, *et seq*., the State of Michigan attempted to address the social problem of wrongful convictions. However, the prosecution's proposed interpretation of these statutes, subsequently adopted by the Court of Appeals, would undo this progress and circumscribe the impact that the statutes may have in providing relief for those wrongfully convicted in the State of Michigan. Through judicial reduction of the scope of claims, injustices that the statutes and court rules were designed to ameliorate will remain.

The prosecution's proposed interpretation of the statutes also runs afoul of vertical federalism concerns. Vertical federalism, regardless of differences between states, concerns protecting the liberties of citizens by delegating power downwards to the most local, and therefore most politically accountable, level. The Federalist No. 46, at 316 (J. Madison) (J. Cooke ed. 1961) (noting a closer connection between the people and their state government than between the people and the federal government). The founders of the United States sought to protect the people from abuses of power by the centralized national government, based on the premise "that officeholders were not to be trusted and that the corrupting effect of power would inevitably cause them to seek their own aggrandizement at the expense of citizens' liberty." Freedman, *Freedom of Information and the First Amendment in a Bureaucratic Age*, 49 Brooklyn L. Rev. 835, 836 (1983) (citing contemporary sources); *see* 3 J. Elliott, *The Debates In The Several State Conventions On The Adoption Of The Federal Constitution*, 563 (2d ed. 1836) (remarks of William Grayson to the Virginia ratifying convention, June 21, 1788: "[P]ower ought to have such checks and limitations as to prevent bad men from abusing it. It ought to be granted on a supposition that men will be bad; for it may eventually be so."). Notions of vertical federalism provide a fundamental balance to overreaching centralized power in the federal government by decentralizing power to the states wherever possible, including the police power.

Consistent with notions of vertical federalism, to avoid repeated federal court intervention in state criminal proceedings, many states have recognized actual innocence as a freestanding claim for relief from judgment, including the State of Michigan. The State of Michigan has authorized this use of power through MCR 6.500, *et seq*., and MCL 770.1, and the courts have an obligation to apply the law rather than circumscribe it.

Here, if the State of Michigan fails to correct the injustice of wrongful conviction, then the prospect of actual innocence claims becoming cognizable as a stand-alone ground for federal habeas corpus relief increases significantly. This pushes the State of Michigan's police power "up" to the federal government, which then becomes responsible for the accuracy of criminal convictions. This result would inappropriately displace one of the core powers reserved to the states: the police power.

If the Court chooses to adopt the narrowed interpretations of the law advanced by the Court of Appeals, federal courts will increasingly need to exercise their broad equitable powers in habeas cases to ensure that innocent persons do not suffer unjust punishment. *See* Jonathan M. Kirshbaum, *Actual Innocence after Friedman v. Rehal: The Second Circuit Pursues a New Mechanism for Seeking Justice in Actual Innocence Cases*, 31 Pace L. Rev. 627, 645 (2011). Such an incursion may be the most egregious affront to vertical federalism possible. The separation of power between state and the federal governments, particularly clear in the criminal context, makes expansive review of state criminal proceedings by federal courts inappropriate. *Herrera*, 506 U.S. at 401 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983)). The "if they don't do it we will do it for them" conclusion implicit in *Herrera* that the federal courts may only hear innocence claims if state process is unavailable either forces the states to act, or threatens that the federal courts will decide guilt or innocence for local violations in the state's stead. *See Herrera*, 506 U.S. at 440-44 (Blackmon, J., dissenting). This is because unjust punishment runs afoul of an actually innocent person's constitutional rights; the government in a civilized society must always be accountable for an individual's imprisonment, and, if the imprisonment does not conform to the fundamental requirements of law, the individual is entitled to immediate release. *Murray v. Carrier*, 477 U.S. 478, 516 (1986) (Brennan, J., dissenting).

In this case, even assuming that the statutes could be fairly read in at least the two ways described above in Sections II and III.a-b, the interpretations clearly differ in objective. The trial court interpreted the statute as written, favoring the interest of justice based on evidence that convinced him that Ms. Swain was wrongfully convicted. Trial Court Opinion at 7 ("That 'significant possibility' [of innocence] continues to exist in this case, even more so than the first time this Court made that determination . . . . This Court has no doubt about it."). The prosecution's argument, adopted by the Court of Appeals, relies on a narrow interpretation of these statutes at the expense of justice for the wrongfully convicted. *See* Plaintiff-Appellee's Brief on Appeal at 44-47. This interpretation invites federal intervention into state criminal proceedings, and thereby weakens the State of Michigan in our federalist system.

While the prosecution's central argument against reopening criminal proceedings appears to be "finality," *id*., justice remains the ultimate goal of the criminal justice system. Finality serves as an excuse for inaction, and is an inappropriate excuse when applied to innocence claims. *Murray v. Carrier*, 477 U.S. 478, 516 (1986) (Brennan, J., dissenting) ("[T]he root principle underlying 28 U.S.C. §2254 is that government in a civilized society must always be accountable for an individual's imprisonment; if the imprisonment does not conform to the fundamental requirements of law, the individual is entitled to his immediate release.").

To be sure, the State of Michigan also has an interest in avoiding frivolous delays. But, reviewing newly discovered evidence in evidentiary hearings generates correspondingly narrow and focused proceedings, which are further streamlined by being heard by the original trial judge, where possible. *See* MCR 6.501, 6.502, 6.504. In any event, the prospects of frivolous delay are minimized by addressing the evidence appropriately from its discovery. Restrictive state proceedings necessitating federal review of meritorious claims redouble any frivolous

delay. On the other hand, if petitioners are granted a continuing opportunity the make claims in state court, then, on federal habeas corpus, any non-meritorious claims will be easily dispatched. Such well-supported state findings will maintain the presumption of correctness under 28 U.S.C. § 2254(d) and the normal rules of exhaustion and procedural default will eliminate these claims without further involvement by the federal courts.[2]

D. The Ethical Mandates of the State of Michigan Require that Prosecutors and Judges Seek Justice, Rather than Expeditiousness

The courts (including judges and prosecutors) have an obligation to see that justice is done for all citizens. Courts are empowered to grant such relief under at least MCR 6.500, *et seq*., and MCL 770.1, and ethically they must use this power to see that justice is done.

1. Ethical Duties of Prosecutors in the State of Michigan

The Michigan Rules of Professional Conduct state that "[t]he prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause . . ." Rule: 3.8, Special Responsibilities of a Prosecutor. The comments expand upon this rule, stating that "[a] prosecutor has the responsibility of *a minister of justice and not simply that of an advocate*. This responsibility carries with it *specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence*." *Id*. (emphasis added.) Moreover, "[i]t is professional misconduct for a lawyer to: . . . (c) engage in conduct that is prejudicial to the administration of justice." Rule: 8.4 Misconduct.

---

[2] Beyond the benefits to federalism, there are numerous additional benefits to the State of Michigan in focusing federal habeas corpus challenges. For instance, claims in federal habeas corpus petitions commonly allege ineffective assistance of counsel, based on a failure to uncover exculpatory evidence. However, the federal judge typically cannot distinguish whether the real attack is on counsel or on the verdict. To prevent injustice, federal judges may be tempted to give more weight to the former attack if the latter appears meritorious, even though counsel could not reasonably have prevented the outcome on the facts that were then available. If proceedings at the state level were litigated on the merits, this problem would not exist, rendering attacks on the performance of counsel fewer and better focused, where applicable. These advantages should not be lost on the State of Michigan, despite not being raised by the prosecution or Court of Appeals.

Lawyers, and prosecutors in particular, have an affirmative obligation to act in furtherance of *justice*. No evidence should be sufficient to decide the guilt of a person who is actually innocent. Further, the duty to see that a defendant is accorded procedural justice requires that prosecutors interpret and apply procedural rules to see that justice is done *for the defendant*. This forecloses arguing to limit the applicability of procedural rules that provide for post-conviction review of cases. Prosecutors must seek justice and not merely to dispose of cases where additional review is sought.

Here, the prosecutors have argued that MCR 6.500, *et seq*., and MCL 770.1 should be interpreted narrowly. The prosecution's arguments go against the interest of justice, attempting to erect additional procedural barriers through 6.502(G)(2). This appears to fly in the face of Rule: 3.8, defining the Special Responsibilities of a Prosecutor "to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." Michigan Rules of Professional Conduct, Rule 3.8. By interpreting these statutes narrowly, the prosecution seeks finality over justice, at the expense of the accused who may be innocent, and victims. Justice cannot be done if punishment is applied to the innocent rather the guilty. The Michigan Supreme Court should reject the prosecutor's interpretation of MCR 6.500, *et seq*., and MCL 770.1. In so doing, the Michigan Supreme Court reiterates that the Michigan Rules of Professional Conduct mean what they say; namely, that the State of Michigan expects lawyers, and prosecutors in particular, to only make arguments that promote justice, rather than expeditious case handling.

The Quentin Lavell Carter case provides an example of these rules in action. When presented with evidence of Mr. Carter's innocence, Kent County Prosecutor William A. Forsyth confronted the alleged wrongful conviction of Mr. Carter, who had served almost 17 years for

criminal sexual conduct, and ordered that the case be reinvestigated. In doing so, Mr. Forsyth sought justice, both for the original victim and for Mr. Carter. *See* Ex. A, Forsyth Press Release. Mr. Forsyth found that Aurlieas Marshall, who had previously pleaded guilty to child abuse involving the same victim, intimidated the victim into implicating Mr. Carter. These were not Mr. Marshall's only offenses. Mr. Marshall was also convicted of a murder, which occurred approximately two years before the abuse charges.

When faced with evidence that Mr. Carter was wrongfully convicted, Mr. Forsyth recognized that it was his office that sought and obtained the wrongful conviction. In the interest of justice, Mr. Forsyth drafted and assisted Mr. Carter in filing a motion to set aside his 1992 conviction. Mr. Forsyth then personally met with and apologized to Mr. Carter. Mr. Forsyth noted that neither the apology nor setting aside the conviction could adequately compensate Mr. Carter for what he had lost. These actions display that a prosecutor's role in the system is not to win convictions, but to secure justice. Such behavior, consistent with Rule 3.8, should be reinforced by the Michigan Supreme Court. In this case, that means the Court should reject the prosecution's narrow interpretation of the procedures available under 6.502(G) to those wrongfully convicted within the State of Michigan.

2. Ethical Duties of Judges in the State of Michigan

The Michigan Code of Judicial Conduct takes the ethical mandate of judges even further. The Michigan Code of Judicial Conduct states that:

> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. A judge should always be aware that the judicial system is for the benefit of the litigant and the public, not the judiciary. The provisions of this code should be construed and applied to further those objectives.

Canon 1, A Judge Should Uphold the Integrity and Independence of the Judiciary. In the criminal context, the "litigant" is the accused or convicted, and judges are specifically directed to see that justice be done in our society, for the public good. However, the public's benefit is only achieved if courts operate to ensure justice for all, including those individuals who are wrongfully convicted. To this end, and to the extent multiple interpretations are possible, Michigan courts should interpret the law expansively to provide opportunities for individuals to prove their innocence. It is commonly recognized that it is "[b]etter that ten guilty persons escape than that one innocent suffer." 4 William Blackstone, Commentaries at *358.

By narrowly construing the statute and court rules, at issue here, the courts ensure the opposite. The law should be developed to promote justice, and judges in Michigan, have a special responsibility to improve the cause of justice:

> As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice.

Canon 4, A Judge May Engage in Extrajudicial Activities. This responsibility extends to interpretation of the law in this case.

Here, Judge Sindt, having presided over the entire trial and having viewed each and every witness presented in the Lorinda Swain case, concluded that Ms. Swain was wrongfully convicted. Trial Court Opinion at 7 ("That 'significant possibility' [of innocence] continues to exist in this case, even more so than the first time this Court made that determination . . . This Court has no doubt about it."). In so ruling, Judge Sindt considered the weight of the evidence, and observed the standards of conduct demanded to protect the integrity and independence of the judiciary. Instead of being attacked as abusing his discretion, judges in Judge Sindt's position, who are aware that the judicial system is for the benefit of the litigant and the public, should be

encouraged to see that justice is done. Judges, and courts in general, must interpret the laws of Michigan for the improvement of criminal justice. That means rejecting the prosecution's narrow interpretation of the procedures available under 6.502(G) to those wrongfully convicted within the State of Michigan.

E. The Costs of Wrongful Conviction Favor Facilitating Early Relief

The Court of Appeals' interpretation of the statute and court rules exacerbates the costs of wrongful conviction. First, many years often pass between wrongful conviction and relief from judgment, in part because of a general tendency for evidence of innocence to be uncovered at a relatively late stage of criminal proceedings. The myriad reasons for this include the intense community pressure to convict someone – anyone – of atrocious crimes. This can lead to law enforcement officials cutting constitutional corners, such as failing to provide relevant exculpatory evidence to the defense. It is often only after the passage of time that witnesses, including law enforcement officers, prosecutors no longer in office, prisoners released from custody, estranged family, friends, or lovers are willing to come forward.

These same pressures also impact defense attorneys. For a lawyer, defending a case involving grievous charges means making a commitment to the full legal and factual evaluation where the client is likely to be the subject of intense public hostility and the state has devoted maximum resources to the prosecution. It also enduring the draining emotional effects of personal responsibility for the outcome.

Finally, although not a criticism of the many outstanding attorneys providing criminal defense at the trial level, the quality of legal representation and amount of resources available for a given case tends to improve somewhat as individuals move through the system. The insufficiency of legal resources for criminal defense results in a system of triage that tends to concentrate resources on those defendants at the highest levels of the appeals courts.

Because of these typical delays, wrongful conviction costs the State of Michigan and its citizens greatly. Wrongful conviction costs the victims of criminal conduct by delaying true justice. Incarcerating the wrong individual for an offense does not see justice done, and leads to reopening of a victim's wounds when the State's error is uncovered. Wrongful conviction may also deny the victim real justice. Delays in prosecuting the real perpetrators may allow statutes of limitation to run, or the evidence to be lost. Moreover, wrongful conviction may create additional victims, if the real perpetrators remain at large committing new offenses.

Wrongful conviction also affects the wrongfully convicted. These individuals lose freedom for years. They are robbed of their earning power, often during their most productive years. The wrongfully convicted also experience unimaginable emotional trauma from the loss of freedom and removal of support by and for friends and family. *See* Forsyth Press Release.

Similarly, families lose individuals who would, if not wrongfully convicted, provide a social, emotional, and productive support to the family. Losses to families include the obvious opportunity costs of salary and savings, as well as direct costs of incarceration, such as telephone bills between loved ones. Those calls for Larry and Melody Souter totaled $83,290.94 during his 13 years in prison for a crime he did not commit. *See* Ex. B, Souter Valuation of Claims at 2. There are also intangible costs, such as loss of consortium, which includes such as loss of companionship, society, and love. *Id*. Even more fundamentally, wrongful conviction can deny families of a next generation, where the lost time robs them of the opportunity to start a family. *See Id*.

Communities also pay a cost for wrongful conviction. They lose individuals who would otherwise be social and productive members. Communities lose a work force participant and an economic demand generator for local businesses. Communities lose social connections, as the

wrongfully convicted is no longer an active participant in churches and other organizations working in the community.

Finally, the State of Michigan pays a high cost when it wrongfully convicts individuals. Of course, the state bears the direct costs of incarceration. However, the state often also must provide significant benefits to families who lose a provider to wrongful conviction. Such support may be in the form of food, shelter, and other public welfare programs. More broadly, the state also loses a work force participant who could otherwise provide support for businesses in the state, both as a source of labor for businesses and in generating demand for businesses by spending money. Moreover, because the wrongfully convicted individual is no longer earning money and paying into the state's coffers, the state loses a tax engine. Importantly, if the innocent are convicted, the state's criminal justice system, and the professionalism of those who work within the system, may lose the public's trust and respect.

Victims, the wrongfully convicted, families, local communities, and the State of Michigan benefit when wrongful convictions are handled as early and quickly as possible, without unnecessary delays and barriers compounding the costs.

IV. CONCLUSION

Despite disproportionately affecting the poorest among us, the principles discussed in this brief affect everyone in our society. Laws must be interpreted as written for each citizen of the State of Michigan. Neither a wronged litigant nor society can afford to be without means to remedy a palpable miscarriage of justice. Therefore, the Court should interpret Michigan's laws to administer justice and protect the remedies necessary to enable the wrongfully convicted to prove their innocence.

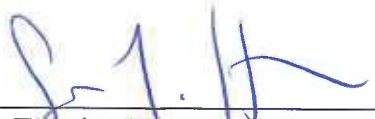
//

//

Dated: January 15, 2016

Respectfully Submitted,

JENNER & BLOCK LLP



Sara Tonnies Horton (admitted *pro hac vice*)
Chad J. Ray (admitted *pro hac vice*)
Paul D. Margolis (admitted *pro hac vice*)
ATTORNEYS FOR AMICUS CURIAE
CURRENT AND FORMER MICHIGAN PROSECUTORS
353 N. Clark Street
Chicago, Illinois 60654

PRICE HENEVELD LLP
Gregory A. Lewis (P75796)
OF COUNSEL
695 Kenmoor Ave SE
PO Box 2567
Grand Rapids, Michigan 49501-2567

Exhibit A

PROSECUTING ATTORNEY

CRIMINAL DIVISION
82 Ionia Ave N.W.
Suite 450
Grand Rapids, MI 49503-3022
Telephone: (616) 632-6710
Fax: (616) 632-6714

WILLIAM A. FORSYTH
Prosecutor

CHRIS BECKER
Chief Assistant Prosecutor

NEWS RELEASE

After more than two decades, a Kent County jury has at long last held Aurlieas (A.J.) Marshall accountable for the senseless and tragic murder of Joel Battaglia. His actions were horrific, the pain and suffering he inflicted on the family and friends of Mr. Battaglia was unspeakable and his efforts to avoid detection by the use of intimidation and threats were reprehensible.

The evil perpetrated by Marshall, however, did not end with the 1990 murder of Joel Battaglia. During the Battaglia investigation, detectives from the Grand Rapids Police Department and the assistant prosecuting attorney assigned to the investigation learned of evidence that suggested Marshall may have been, in large part, responsible for the wrongful conviction of Quentin Lavell Carter.

In 1992, shortly before his 17th birthday, Mr. Carter was convicted by a jury of criminal sexual conduct in the first degree for an alleged sexual assault of a ten year old girl; he was initially sentenced to 6-20 years in prison. At trial, the victim, a former neighbor of Mr. Carter, identified him as the perpetrator; although inadmissible in court, the results of Mr. Carter's polygraph examination, an exam that he had requested to take prior to trial, lent credence to her identification. In addition, her testimony was supported by the fact that she suffered from injuries consistent with having been sexually penetrated.

Unfortunately, the victim's mother did not report the assault to the police and waited 10 days to take her to the hospital for a physical examination; i.e., the offense was alleged to have occurred on September 3rd and the examination took place on September 13th[1]. Although the examination revealed numerous physical injuries to the victim, no DNA evidence was recovered.

After becoming aware of the evidence that potentially exonerated Mr. Carter, both the detectives and the assigned prosecutor spent countless hours reinvestigating the case against him. After doing so, it is their collective opinion that the child was not assaulted by Mr. Carter but rather by her mother's live-in boyfriend, A. J. Marshall. It is their further belief that in an effort to avoid detection for having sexually assaulted the victim, Marshall forced the girl to incriminate Mr. Carter by physically and psychologically abusing her. Aside from providing cover for his own criminal wrongdoing, it is believed that Marshall may have targeted Mr. Carter in particular because he owed him money for a drug debt. It should be noted that Marshall pled guilty in January of 1992 to child abuse; his victim was the same ten year old girl who he had beaten, coerced and forced to implicate Mr. Carter.

---

[1] **Personnel from Blodgett Hospital immediately contacted the Grand Rapids Police Department after conducting the exam on September 13th.**

At great personal sacrifice, Mr. Carter has maintained his innocence for over 23 years. While in prison, he was encouraged to admit guilt and participate in a counseling program for convicted sex offenders; he refused. His perceived lack of remorse and cooperation may explain, in part, why he was repeatedly denied parole; i.e., instead of being released after he had served his 6 year minimum sentence, he remained incarcerated for almost 17 years.

While Marshall's actions were abhorrent and nearly impossible to comprehend, he is not the only person responsible for what happened to Mr. Carter. In the last analysis, it was my office that charged Mr. Carter and it was my office that sought and obtained the conviction that led to his imprisonment.

Regrettably, the information disclosed during the Battaglia investigation and the reinvestigation of the Carter case leads to the inescapable conclusion that Mr. Carter should not have been convicted of criminal sexual conduct. As a result, my office drafted and has assisted Mr. Carter in filing the attached motion to set aside his 1992 conviction

I have personally met with and apologized to Mr. Carter. During our meeting, I also told him that we are attempting to vacate his conviction and explained to him the steps involved in that process. I fully recognize, however, that neither my apology nor the setting aside of his conviction can begin to adequately compensate Mr. Carter for what he has lost. Tragically, there is nothing that can be done to restore his youth or return to him the years he spent in prison.

William A. Forsyth
Kent County Prosecuting Attorney
6/10/15

Approved, SCAO

Original - Court
1st copy - Prosecutor

2nd copy - Defendant
3rd copy - Defendant attorney

STATE OF MICHIGAN 17th JUDICIAL CIRCUIT KENT COUNTY	MOTION FOR RELIEF FROM JUDGMENT	CASE NO. 91-56163-FC

ORI MI-	Court address	Court telephone no.
	180 OTTAWA AVENUE NW, GRAND RAPIDS, MI 49503	(616) 632-5220

THE PEOPLE OF THE STATE OF MICHIGAN

v

Defendant name, address, and inmate no.
QUENTIN LAVELL CARTER
1908 Union SE
Grand Rapids, MI 49507

To be completed by the court.

CTN/TCN	SID	DOB
41 91 140647 01	1611548L	05/28/1975

INSTRUCTIONS: Answer each question as completely as you can. If you need more space to answer any question, you may attach extra pages. You may also attach documents, affidavits, or a brief, if you wish. Only one motion for relief may be filed, except as indicated in MCR 6.502(G)(2). Information for items 1 and 2 is on both your judgment of sentence and basic information sheet, which are available at the prison record office.

1. I was found guilty on 02/26/1992 (Date) of the crime(s) stated below.

Count	CONVICTED BY Plea*	Court	Jury	DISMISSED BY*	CRIME	CHARGE CODE(S) MCL citation/PACC Code
			X		CSC 1ST	750.520B1A

*For plea: insert "G" for guilty plea, "NC" for nolo contendere, or "MI" for guilty but mentally ill. For dismissal: insert "D" for dismissed by court or "NP" for dismissed by prosecutor/plaintiff.

2. I was sentenced as stated below by Hon. Robert A. Benson (Name of judge).

Count	SENTENCE DATE	MINIMUM Years	Mos.	Days	MAXIMUM Years	Mos.	DATE SENTENCE BEGINS	JAIL CREDIT Mos.	Days	OTHER INFORMATION
	5/5/1992	6			20		9/20/1991			

3. Fill in the charts below with the information requested about the court proceedings in your case and the names of the attorneys who represented you.

a. **Trial Level - All Proceedings.** From arrest to sentencing, including lineups and other proceedings.

NAME OF PROCEEDING	NAME OF ATTORNEY
Preliminary hearing	Deno Fotieo
Trial	Deno Fotieo
Sentencing	Deno Fotieo
Motion for New Trial	Lawrence Katz

NAME OF PROCEEDING	NAME OF ATTORNEY

b. **Postconviction - All Proceedings.** State and federal, including appeals, posttrial motions, and habeas petitions.

COURT	DOCKET NO.	NAME OF PROCEEDING	NAME OF ATTORNEY	RESULT	DATE OF RESULT
Court of Appeals	155599	Appeal of Right	Lawrence Katz	Conv/Sent Affirmed	8/10/1994

(Continued on the other side.)

4. **Appointment of Counsel.** Do you want an attorney appointed? ☑ Yes ☐ No If yes, complete and attach a financial schedule.

5. **Grounds and Relief.**

a. What action do you want the court to take? Set aside conviction

b. What are the legal grounds for the relief you want? **You must raise all the issues you know about.** You may not be allowed to raise additional issues in the future. Use extra sheets of paper, if necessary.

ISSUE ONE: Based on the victim's recent acknowledgment under oath that she lied at the trial, the conviction should be set aside based on this newly discovered exculpatory evidence.

Supporting facts: See attached memorandum.

ISSUE TWO:

Supporting facts:

ISSUE THREE:

Supporting facts:

ISSUE FOUR:

Supporting facts:

I declare that the statements above are true to the best of my information, knowledge, and belief.

06/10/2015
Date

Signature

PROOF OF SERVICE

I certify that on this date I served a copy of this motion upon the prosecutor by ☑ personal service. ☐ first-class mail.

06/10/2015
Date

Signature

STATE OF MICHIGAN
IN THE 17TH CIRCUIT COURT FOR THE COUNTY OF KENT
* * * * * * * * *

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff, v QUENTIN LAVELL CARTER, Defendant.	Hon. George S. Buth Case No. 91-56163-FC
William A. Forsyth (P23770) Kent County Prosecutor's Office 82 Ionia Avenue NW – Suite 450 Grand Rapids, MI 49503 (616) 632-6710	Quentin Lavell Carter *In Pro Per* 1908 Union SE Grand Rapids, MI 49507 (616) 350-6740

MEMORANDUM IN SUPPORT OF MOTION FOR RELIEF FROM JUDGMENT

NOW COMES Quentin Lavell Carter, *in pro per*, and, in support of his Motion for Relief from Judgment, Defendant argues the following:

Pursuant to MCR 6.502, Defendant seeks to have this Honorable Court set aside his conviction for CSC 1st.

As an initial procedural matter, while a motion to set aside the conviction was previously filed in 2002, the motion was never heard and this Court has never ruled on its procedural or substantive merits; therefore, this is the first motion for relief from judgment to be presented to this Court for actual resolution.

LEGAL STANDARD

Pursuant to MCR 6.508(D), it is the defendant's burden to establish entitlement to relief. Because the initial appeal was decided in August 1994, the case is no longer subject to direct review and therefore the bar of §508(D)(1) does not apply. While the issue of the sufficiency of the evidence was previously raised in Defendant's direct appeal, Defendant submits that the newly discovered evidence of the victim's acknowledgement under oath that she lied at the initial trial constitutes a basis for relief from judgment. Because that

evidence did not and could not come to light until it occurred recently, Defendant submits that this Court should analyze this motion under §508(D)(3), which states that this Court cannot grant relief if the motion:

> alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates
>
> (a) good cause for failing to raise such grounds on appeal or in the prior motion, and
>
> (b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,
>
> (i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal; . . .
>
> (iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case; . . .
>
> The court may waive the "good cause" requirement of subrule (D)(3) if it concludes that there is a significant possibility that the defendant is innocent of the crime.

As the Supreme Court noted in *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003), "[f]or a new trial to be granted on the basis of newly discovered evidence, a defendant must show that (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." (internal quotations and citation omitted). In *Cress*, the Supreme Court found that the trial court's determination that a third-party's confession to having committed the murder lacked credibility based on how it deviated from the known facts of the case, and therefore the trial court did not abuse its discretion in denying the motion for a new trial. Implicit in the holding of the Supreme

Court is that, if the trial court had found the third party confession credible, it would not have been an abuse of discretion to grant the defendant relief.

FACTUAL SUMMARY

The testimony at the trial was summarized by Judge Benson in his opinion ordering that Defendant be sentenced as an adult: "We had a young girl who was sodomized by Mr. Carter while she was held down, and just prior to that she had been vaginally raped by Mr. Carter's friend while Mr. Carter held her down. So we have a ten-year-old girl who is accosted at a place of safety, in her home, dragged to the porch, brutalized by these two people, then threatened with her life, and threatened to the point where she took a severe beating before she would tell anybody" (4/27/92 Tr, 7). As Judge Benson noted at the time, "Mr. Carter denies any involvement or any wrongdoing whatsoever" (*Id.*, 10).

The investigation into the CSC began when the victim's mother brought a urine sample into a clinic asking that it be tested for pregnancy. When asked, the mother eventually stated it was from her 10-year-old child. The mother was told that the child needed to be examined, and that the clinic was going to follow up on this. When the mother brought the child to a doctor for evaluation, not only was there evidence of a sexual assault, the victim had been severely beaten. The mother's boyfriend, Aurelias Marshall, admitted beating the victim, supposedly to get her to disclose with whom she had sex. Mr. Marshall went to prison for Child Abuse 1st Degree. At trial, the only identification of Defendant as one of the perpetrators of the crime came from the victim. Unfortunately, the victim's mother did not report the assault to the police and waited ten days to take her to the hospital for a physical examination. Although the exam revealed numerous physical injuries to the

victim, including injuries consistent with having been sexually penetrated, no DNA was recovered.

Recently, the Kent County Prosecutor's Office reopened an investigation into the 1990 murder of Christopher Battaglia. In the course of questioning under an investigative subpoena, the CSC victim, who is now an adult, admitted that she lied at Defendant's trial. She testified that the beatings she received from Mr. Marshall were not to get her to reluctantly identify her assailant, but to make sure that she identified someone as an assailant in a gang rape rather than Mr. Marshall, who had been molesting her. The victim also disclosed that, while being taken for medical treatment approximately 10 days after the sexual assault, she was warned by her mother to not say anything bad about Mr. Marshall or she would be beaten more. Because of her fear of what Mr. Marshall could do to her and her family, even after he was incarcerated for child abuse, the victim persisted in identifying Defendant at trial as one of her assailants in a supposed gang rape, and for some time afterwards.

The Kent County Prosecutor's Office reinterviewed several people regarding the CSC, including Defendant. It was learned that Defendant served approximately 17 years of his 20 year maximum term, in part because he refused to admit involvement in the crime, despite knowing that he could have been considered for parole after 6 years if he had admitted involvement. Defendant continued to insist that he was not involved in the sexual assault of the victim. Defendant also stated that Mr. Marshall, who was in jail on his child abuse charge while Defendant was awaiting trial on the CSC charge, told Defendant that he would testify on Defendant's behalf at trial. When Mr. Marshall was called to the courtroom at Defendant's trial, Mr. Marshall invoked his Fifth Amendment right against

self-incrimination despite having pled guilty to Child Abuse 1st Degree.[1] Defendant had relied on Mr. Marshall's communication that he would testify for Defendant at the trial in preparing and presenting a defense; just as Mr. Marshall's beating of the victim was done to manipulate the identification of the true assailant, his efforts sabotaged Defendant's trial.

In the course of the re-investigation into the CSC, the victim's mother has now acknowledged that she was aware that the victim had indicated Mr. Marshall had molested her while he was in the home, and that Mr. Marshall, while beating the victim in the incident that led to his child abuse charges, was not asking the victim about who she had sex with or who had raped her, but instead was telling her to identify Defendant as an assailant. Other statements of the mother at the time of the initial report have also been undermined by subsequent information: she had stated that Mr. Marshall beat the victim to disclose who she had been sleeping around with as a 10-year-old, but interviews and records have demonstrated that the victim and her siblings were essentially trapped in their rooms during the time Mr. Marshall was at the house (including urinating in their rooms for fear of going out into the hallway to use the bathroom), so there was no reasonable possibility that the victim could have been "sleeping around" at the time.

---

[1] The issue of Mr. Marshall's unexpected invocation of his Fifth Amendment rights, and whether it was a valid exercise of that right, was raised on direct appeal, and the Court of Appeals found that Mr. Marshall's status of post-plea but pre-sentencing on his child abuse charge entitled him to the protection against self-incrimination. This information is presented not to re-litigate the validity of whether Mr. Marshall could invoke his rights, but to give context to what occurred and to help this Court assess the credibility of the victim's subsequent recantation.

Unfortunately, in her young life, the victim was sexually assaulted at least three times: when she was 7 years old,[2] this incident, and when she was 13 years old.[3] The victim has not recanted any of the information about the other assaults, and so her statement that Defendant was misidentified should be viewed as having even more credibility.

Ultimately, what makes this request unique among the motions for relief from judgment reviewed by this Court in which there is a claim that a victim or witness has recanted their earlier testimony, is that, after the investigative subpoenas were completed in the murder case, it was the Kent County Prosecutor's Office that has requested and encouraged Defendant to file this motion. The Prosecutor's Office felt compelled to disclose this recently obtained information to Defendant pursuant to *Brady v Maryland*, 373 US 83 (1963). In fact, this motion was largely drafted by members of the Prosecutor's Office to assist Defendant in having this Court grant him his motion for relief from judgment. As a result, Defendant requests that this Court, pursuant to MCR 6.504(B)(4), order a response from the Prosecutor's Office to verify this information.

Specifically noting the requirements for relief under MCR 6.508(D)(3)(b)(i), Defendant argues that, had the victim stated at the trial that she had been beaten by Mr. Marshall in order to compel her to falsely implicate Defendant, there would, without question, have been "a reasonably likely chance of acquittal." Because of the manipulative actions of Mr. Marshall, the victim lied under oath at Defendant's trial, an irregularity "so offensive to the maintenance of a sound judicial process that the conviction should not be

---

[2] The assailant was her step-father, and he confessed, pled guilty, and served prison time for the offense.

[3] The assailant was an older juvenile cousin who was taken out of the home and put into juvenile custody and programming.

allowed to stand." MCR 6.508(D)(3)(b)(iii). In terms of the good cause analysis, Defendant submits that he, as a private citizen, did not have the ability to examine the victim under an investigative subpoena, and therefore the presentation of this information to the Court at this time should be found to be good cause for failure to raise this information before. To the extent that there has been a delay in filing this motion since the disclosures in the investigative subpoena process (December 4, 2014), Defendant notes that the Prosecutor's Office requested a delay in filing this until Mr. Marshall's trial for the murder of Christopher Battaglia was completed so that Mr. Marshall's jury would not be tainted by the disclosure of this information, and Defendant, who is no longer incarcerated or on parole, agreed to the request.

THEREFORE, Defendant respectfully requests that this Court enter an order pursuant to MCR 6.504(B)(4) directing the Prosecutor's Office to respond to this motion for relief from judgment, and, upon receiving that response, grant Defendant relief from the judgment imposed on him in 1992.

Date: June _____, 2015

Respectfully submitted,

_____

Quentin Carter

Exhibit B

Larry and Melody Souter / Newaygo County, et al:

Valuation of Claims

Larry and Melody Souter seek redress for damages suffered as a result of the actions of Newaygo County, its agents and employees: they seek damages for Larry's loss of liberty, for his unimaginable pain and suffering, and for Melody's emotional pain and suffering.

Larry and Melody persistently protested Larry's innocence and fought for judicial redress from his 1992 conviction through the 2005 vacation of that conviction. Newaygo County just as vigorously opposed the Souters' efforts to regain Larry's liberty. When the United States Sixth Circuit Court of Appeals remanded Larry's petition for Habeas Corpus for reconsideration to the U.S. District Court, Newaygo County was appalled. When the U.S. District Court for the Western District of Michigan learned of Newaygo's failure to produce additional exculpatory information and ordered Larry's immediate and unconditional release, Newaygo County was alarmed. Newaygo County could and should have responded to these clear indicators of Larry's innocence by revealing the truth. Instead, however, as more and more evidence surfaced casting more and more doubt on Larry's conviction, Newaygo County fixed upon the notion of proving his guilt, and resorted to an "Administrative Review" in a desperate and futile effort to send Larry back to prison.

During Larry's 1992 trial, photographs and witnesses that would have contradicted the Prosecution's theory of how Larry might be guilty were known to at least one Newaygo county detective, and likely to more. They knew as they listened to the government's arguments that the prosecution was premised on false information and that critical exculpatory information had been withheld. But they did not flinch. There is nothing that could justify Newaygo County's actions and those of its agents and employees. To Newaygo County, Larry Souter's life and liberty, as well as that of his family, just did not matter.

While Larry Souter languished in prison, assuming that he would die there, those who knew of evidence that would exculpate him had full lives, relationships with family and friends, and long careers.

Conditions in prison were difficult. At one point a contract was put on Larry's life for opposing the anarchy and lawlessness of prison life. He watched his best friend in prison suffer and die of a heart attack, and then watched in horror as his friend's corpse was shackled and chained before it was removed from the prison. Larry lived each day of his incarceration under the anguish of believing that he could die without ever knowing freedom again. If he died in prison, he knew his corpse would be handled like his friend's.

While Larry struggled to maintain his sanity within prison, Melody worked just as hard to exonerate her gentle and soft-spoken husband. She took upon herself the responsibility of establishing his innocence and freeing him from prison. This quest consumed her life, and the burden of proving his innocence wore on her.

Melody's claims are styled as a loss of consortium, which under the law includes intangible factors, such as the loss of a lifetime of companionship, society, and love. Before Larry's arrest, Larry and Melody were an inseparable, loving, and supportive couple; their relationship was of an invaluable nature. Throughout his incarceration she fought to maintain their close relationship.

The loss of consortium also refers to measurable losses, such as financial and household support. Melody had losses falling into each of those categories. In addition, Larry and Melody were hoping to conceive a child when Larry was arrested. Because of his arrest she lost the opportunity to bear Larry's children and to raise those children with him. During Larry's incarceration Melody had a hysterectomy necessitated by her health, effectively ending her hopes for motherhood.

Melody tried to stay in close contact with Larry through regular visits and telephone calls. Melody always thought that Larry would one day be exonerated, and toward that end she saved each telephone bill for their calls to one another, hoping that one day she could repay her parents who paid her telephone bills. Those telephone bills, totaling $83,290.94, reflect both Melody's commitment to Larry as well as the quality of their lost years and what might have been.

There is no sum of money that can "make the Souter's whole." Likewise, there is no sum of money for which the Souters would have volunteered to experience what they have, effectively sacrificing their lives. Their lost liberty and opportunities are truly priceless. As noted by the *Limone* court, "no man's liberty is dispensable…Our system cherishes each individual. We have fought wars over this principle. We are still fighting those wars." (p. 23)

Newaygo County's actions are especially enraging because they breach the public trust. While the cost of Newaygo County's misconduct has been profound for Larry and Melody Souter, the cost to the Newaygo County system of justice has also been extreme. The *Limone* court observed that when law enforcement perverts its mission, the criminal justice system does not easily self correct, and that this is why we have an appellate process. (p. 23) What Newaygo County did to Larry Souter goes far beyond the norms of law enforcement mistake and beyond the unavoidable errors of a fallible system, as has frequently been seen in the instances of eyewitnesses whose mistaken testimony has been corrected through DNA exonerations. Newaygo County's actions toward Larry Souter demonstrate a pattern of intentional misconduct, conspiracy, and the framing of an innocent man. It is difficult to correct law enforcement actions of this sort that are more easily buried. The public relies on the integrity and

professionalism of law enforcement officials to confront errors with courage, encouraging public confidence in an inherently fragile process of truth finding.

It took extraordinary efforts to uncover the injustice done to Larry Souter and his family. It took the unflagging efforts of Larry Souter's wife, his sisters, numerous lawyers, persistent demands under the Freedom of Information Act, and media coverage. In the end, the whole assemblage of evidence turned upon the coincidence that Carla Keller happened to see a newspaper article about Larry's case before the Sixth Circuit Court of Appeals and called to a lawyer's attention that yet more exculpatory evidence was in Newaygo County's possession. As noted by the *Limone* court, proof of innocence in any court in the United States, including the smallest of county courts, should not depend upon coincidence and efforts as gargantuan as those put into Larry's exoneration.

Ultimately and regrettably the Souters' pain cannot be undone, and those parties who are financially responsible for Newaygo County's misconduct can offer Larry and Melody Souter only financial recompense. But how much is enough? It is appropriate to look for guidance in valuing the Souter matter to preceding cases, just as a court would. A synopsis and copies of relevant cases are attached.

The attached case law supports the general rule that judgments typically value wrongful conviction and incarceration at $1 million/year. Some of the attached cases place that value higher, and some lower. The judgment value seems to turn on several factors: the extent to which there was wrongdoing by the criminal justice system; whether the life lost through wrongful conviction was a "good one" (taking into consideration past criminal conduct, homelessness, mental illness, etc.); whether incarceration was shocking and difficult for the plaintiff; whether the plaintiff is a likable person. Larry registers high marks on this loss continuum. In addition, few published cases include have also included a loss of consortium claim, as is the case here.

In the case of the Souters and Newaygo County, as suggested through the DVD presentation, the plaintiffs will establish a sustained pattern and practice of wrongdoing and cover-up by the Newaygo County Sheriff's Department, its agents and employees. Larry Souter, in turn, is a likeable, gentle, soft-spoken, articulate, and polite person. Jurors and jurists will recognize him as wanting no more than any man, to be allowed to work to create a joyful and constructive life. When he was arrested, Larry was a stranger to the criminal justice system, having no prior criminal record. For Larry, his 13 years in prison was a sustained experience that was mind-numbing and chronically humiliating. It permanently altered his emotional and intellectual life. Larry and Melody had a good and loving relationship when he was arrested and convicted, which suffered through his incarceration. Jurors will admire Melody's dedication, fidelity, and perseverance, and respect her sacrifice.

Not included in the attached materials is the reported settlement, *Godschalk v. Montgomery County,* 2003 WL 22998364, which the defense raised for discussion through the mediator. Plaintiff Godshalk settled his claim against the district attorney's office for $740,000 after 18 years of wrongful incarceration following a coerced confession in which the police officers "planted" details that enhanced Godschalk's appearance of culpability. The district attorney denied Godschalk's request for a DNA test, and Godschalk spent four more years in prison before a court ordered the DNA test that ultimately exonerated him. Godschalk's reported settlement is a disposition with the district attorney's office only. The disposition of his remaining claims against the culpable police officers is unknown.

Considering the *Godschalk* claim in the context of all these facts, and considering particularly the strength of immunity assigned to prosecutors, the Godschalk settlement is actually consistent with the Souters' assertion that wrongful imprisonment is properly valued at approximately $1 million/year. The partial settlement of $740,000 was for wrongdoing that covered only four years against an official with a very high immunity threshold. Over four years, the $740,000 would be annualized to $185,000/year, or considered another way, 18.5% of one million. While the prosecutor may have delayed the DNA test that led to Godschalk's exoneration, the prosecutor had nothing to do with the wrongdoing that put Godschalk in prison in the first place. In light of that factor, as well as the immunity issue, an assignment of an 18.5% contribution by the prosecutor's office is consistent with the Souters' valuation of $1 million/year for wrongful incarceration among all defendants.

Larry and Melody Souter seek redress for their damages suffered as a result of the actions of Newaygo County, its agents and employees: they seek damages for Larry's loss of liberty, for his pain, and for Melody's pain.

Larry and Melody persistently protested Larry's innocence and fought for judicial redress. Newaygo County just as vigorously opposed the Souters' efforts to regain liberty. When the United States Sixth Circuit Court of Appeals remanded Larry's petition for Habeas Corpus for reconsideration to the U.S. District Court based upon Newaygo's failure to disclose bloody clothing and Dr. Cohle's and Dr. Bauserman's modifications of their testimony, Newaygo County was appalled. When, soon after, the U.S. District Court for the Western District of Michigan learned of Newaygo's failure to produce the Keller information and ordered Larry's immediate and unconditional release, Newaygo County was alarmed. Newaygo County could and should have responded to these clear indicators of Larry's innocence by revealing the truth. Instead, however, as more and more evidence surfaced casting more and more doubt on Larry's conviction, Newaygo County fixed upon the notion of an "Administrative Review" in a desperate, sloppy, and futile effort to prove his guilt.

Photographs and witnesses that would have contradicted the Prosecution's theory of how Larry might be guilty were known to at least one Newaygo county detective, and likely to more, as they observed Larry's trial. They knew that the prosecutor's argument was premised on false information and that critical exculpatory information had been withheld – but they did not flinch. There is nothing that could justify Newaygo County's actions and those of its agents and employees. To Newaygo County, Larry Souter's life, and those of his family, just did not matter. While Larry Souter languished in prison, assuming that he might die in prison, those who knew of evidence that would exculpate him had the careers and personal lives they chose for themselves.

Conditions in prison were difficult. At one point a contract was put on his life.

As noted by the Limone court, "no man's liberty is dispensible...Our system cherishes each individual. We have fought wars over this principle. We are still fighting those wars."

Cost to Law Enforcement and to public trust. The cost to Larry and to his family has been profound. But the cost to our system of justice has also been extreme. The Limone court observed that when law enforcement perverts its mission, the criminal justice system does not easily self correct, and that this is why we have an appellate process. But what Newaygo County did to Larry Souter goes well beyond mistake and beyond the unavoidable errors or a fallible system as has frequently been seen in the instances of eyewitnesses whose mistaken testimony has been corrected through DNA exonerations. Newaygo County's actions toward Larry Souter demonstrate a pattern of intentional misconduct, conspiracy, and the framing of an innocent man. It is difficult to correct law enforcement actions of this sort that are more easily buried. The public relies on the integrity and professionalism of law enforcement officials.

It took extraordinary efforts to uncover the unjustice done to Larry Souter and his family. It took the unflagging efforts of Larry Souter's wife, his sisters, many many lawyers, persistent demands under the

Freedom of Information Act, and media coverage. In the end, the whole assemblage of evidence turned upon the coincidence that Carla Keller happened to see a newspaper article about Larry's case before the Sixth Circuit Court of Appeals and was brave enough to call to the lawyer's attention yet more exculpatory evidence was in Newaygo county's possession. As noted by the Limone court, proof of innocence in the United States should not depend upon coincidence and efforts as gargantuan as these.